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No. 81-2358

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN NATIONAL BANK, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below erred in holding that the gross statistical disparities in the percentage of blacks working for petitioner in white collar jobs compared with the percentage in the relevant work force in the surrounding geographic area were sufficient to prove prima facie that petitioner had engaged in a pattern and practice of discrimination.

2. Whether the court of appeals erred in holding that the prima facie case was not rebutted by a binomial distribution analysis revealing that the difference between the expected and actual number of blacks employed was preponderantly within or above a range of two to three standard deviations.

3. Whether the court of appeals correctly held that the district court had committed legal error in its findings that the EEOC's prima facie case had been rebutted by incomplete, undifferentiated applicant flow statistics, the absence of a sufficient number of hiring decisions to support an inference of discrimination, and a failure to prove that individual applicants, whose testimony was offered solely to buttress the pattern and practice case, had been discriminated against.

4. Whether the court of appeals correctly found that petitioner's Portsmouth branches could be included in this suit, because the EEOC's charge letter and conciliation effort with petitioner, although directed at the Suffolk branches, were sufficient as a practical matter to give petitioner notice and an opportunity to conciliate with regard to Portsmouth.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–93) is reported at 652 F.2d 1176. The order of the court of appeals denying rehearing en banc (Pet. App. 243–262) is not reported. The opinion of the district court (Pet. App. 96–241) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1981. A timely petition for rehearing was denied on May 18, 1982. The petition for a writ of certiorari was filed on June 25, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1969, Sandra Holland, a black applicant for employment at one of petitioner's branch offices in Suffolk, Virginia, was rejected for employment and subsequently filed with the Equal Employment Opportunity Commission a discrimination charge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Pet. App. 3). In March 1974, the Commission found reasonable cause to believe that petitioner had engaged in discriminatory hiring practices and attempted to conciliate the problem with petitioner. Although those efforts failed, Holland took no further action regarding the matter (*ibid.*).

2. In January 1976, the instant Title VII suit was filed by the EEOC in the United States District Court for the Eastern District of Virginia, alleging that petitioner had engaged in a pattern or practice of racial discrimination in hiring at its Suffolk and Portsmouth branches between 1969 and 1975, in violation of 42 U.S.C. 2000e–2(a)(1). Prior to trial, petitioner successfully moved to dismiss on the ground that the EEOC's suit was barred by laches. 420 F. Supp. 181 (E.D. Va. 1976). The court of appeals reversed and remanded the case for trial. 574 F.2d 1173, cert. denied, 439 U.S. 876 (1978).

At trial, the EEOC's primary evidence was a statistical showing of substantial disparities between the number of blacks in clerical and managerial jobs at petitioner's two Suffolk and seven Portsmouth branches and the number of available blacks qualified for those jobs in the relevant job market.[1] In addition, EEOC presented evidence regarding

[1] The data broken down into specific categories are as follows (Pet. App. 44–46):

Suffolk Branch Officials & Managers

	Number and Percentage of Blacks		*Percentage of Blacks in Available Work Force*	
	Number	*Percentage*	*Suffolk*	*Nansemond County*
1968	0	0.0	8.0	10.9
1969	0	0.0	8.0	10.9
1970	0	0.0	8.0	10.9
1971	0	0.0	8.0	10.9
1972	0	0.0	8.0	10.9
1973	0	0.0	8.0	10.9
1974	0	0.0	8.0	10.9
1975	0	0.0	8.0	10.9

the hiring practices of petitioner. EEOC claimed that petitioner used an informal, word-of-mouth hiring process with all white interviewers that placed substantial weight on references from current employees at the bank which tended to perpetuate past discrimination because so few blacks were or ever had been employed by petitioner (Pet. App.

Suffolk Branch Office & Clerical Workers

	Number and Percentage of Blacks		*Percentage of Blacks in Available Work Force*	
	Number	*Percentage*	*Suffolk*	*Nansemond County*
1968	0	0.0	10.3	22.5
1969	0	0.0	10.3	22.5
1970	1	5.3	10.3	22.5
1971	2	11.1	10.3	22.5
1972	2	10.0	10.3	22.5
1973	1	4.8	10.3	22.5
1974	0	0.0	10.3	22.5
1975	0	0.0	10.3	22.5

Portsmouth Branch Officials & Managers

	Number and Percentage of Blacks		*Percentage of Blacks in Available Work Force*	
	Number	*Percentage*	*Portsmouth*	*Norfolk-Portsmouth SMSA*
1968	0	0.0	6.9	4.8
1969	0	0.0	6.9	4.8
1970	0	0.0	6.9	4.8
1971	0	0.0	6.9	4.8
1972	0	0.0	6.9	4.8
1973	1	2.8	6.9	4.8
1974	1	2.8	6.9	4.8
1975	1	2.7	6.9	4.8

Portsmouth Branch Office & Clerical Workers

	Number and Percentage of Blacks		*Percentage of Blacks in Available Work Force*	
	Number	*Percentage*	*Portsmouth*	*Norfolk-Portsmouth SMSA*
1968	1	1.1	21.5	13.9
1969	0	0.0	21.5	13.9
1970	3	3.2	21.5	13.9
1971	5	4.9	21.5	13.9
1972	8	6.5	21.5	13.9
1973	7	5.9	21.5	13.9
1974	7	5.3	21.5	13.9
1975	10	9.3	21.5	13.9

156–178). Finally, the government offered the testimony of 31 unsuccessful applicants, who claimed that they had been denied employment on account of their race (Pet. App. 180–214). Both the hiring practices and unsuccessful applicant evidence were offered to bolster the basic statistical proof relied upon by the Commission (*id.* at 116 n.17).

At trial, petitioner attempted to show that its hiring decisions were based largely on a candidate's work experience and education and not directly or indirectly on race (Pet. App. 156–178). It also offered applicant flow statistics, showing how many qualified blacks had applied for jobs at the Suffolk branches between 1969 and 1975 and the Portsmouth branches in 1975, in order to show that any statistical disparities in its work force were the product of past rather than current discrimination (Pet. App. 139–144). Finally, petitioner applied a binomial distribution analysis (see note 9, *infra*) to the statistical disparities between white collar blacks employed by petitioner and those in the relevant work force, and argued that the apparent disparities were not statistically significant (Pet. App. 147).

2. In a lengthy opinion, the district court entered judgment for petitioner. First, it held that it lacked jurisdiction over the claims against the Portsmouth Branches (Pet. App. 109–114). It found that Portsmouth's practices had not been included as part of the EEOC's conciliation efforts, which the court concluded was a jurisdictional prerequisite to the inclusion of those practices in the suit filed by the EEOC. Nonetheless, the district court proceeded to consider the merits of all of the EEOC's claims against petitioner (Pet. App. 114).

On the merits, the district court first held that the statistical proof of gross disparities in hiring presented by the EEOC were sufficient to prove prima facie that petitioner had engaged in a pattern and practice of discrimination in its hiring in both Portsmouth and Suffolk (Pet. App. 138).[3]

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[3] In the first section of its opinion concerning the prima facie case, the district court also found with regard to petitioner's hiring practices (Pet. App. 123):

> The criteria and standards used as part of the decision-making process in hiring were not written. * * * Assessments, there-

The district court then concluded that the EEOC's prima facie case had been rebutted by petitioner's evidence. First, the court found that by comparing the number of black applicants for *all* jobs with the total number of black hirings for all jobs, the results indicated that black hirings were somewhat comparable to black applications (Pet. App. 139–147). Second, the court found that applying a binomial distribution analysis to the disparities between blacks in petitioner's work force and those in the available work force in part dispelled the inference of discrimination, because the standard deviations did not consistently exceed two or three (Pet. App. 147–153).[3] Finally, the court

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fore, could vary from interviewer to interviewer. * * * There were no written job descriptions. * * * All of the officials involved in the decision-making process were white. * * * None of them had received formal training in screening, interviewing, or hiring, and only a few had previous experience in hiring. * * *

A recommendation of a candidate by any of petitioner's employees, virtually all whom were white, also played at least a part in the hiring process. The district court found that bank "[o]fficials admitted that an applicant might improve his prospects of obtaining a position by listing friends and relatives" employed by the bank (*id.* at 166, 121). The court noted that in addition to contacting prior employers, petitioner "used the listed friend or relative as an additional reference source" (*id.* at 166).

[3] The district court found that a comparison between the black clerical labor force in the local area surrounding the Portsmouth branches and petitioner's clerical workforce in Portsmouth revealed disparities which consistently exceeded two to three standard deviations (Pet. App. 152). The district court also found that a comparison between black clericals in the Portsmouth branches and black clericals in the wider metropolitan area yielded disparities in standard deviations which exceeded the two to three range in 1969 and 1970 (Pet. App. 153). "Thereafter, until 1975, the number [of standard deviations] remained between two and three * * *." *Ibid.*

When petitioner's hiring of blacks was analyzed for all job categories together, rather than separately, and compared to the proportion of blacks in the general population in both the local and metropolitan areas surrounding each city, the disparities consistently exceeded two to three standard deviations. The district court found that "these statistics cast suspicion on defendant's claim that employees are hired without regard to race" (Pet. App. 150). Nonetheless the court ultimately concluded that the standard deviation analysis helped to rebut the prima facie case.

concluded that petitioner's hiring practices, which the court found properly emphasized a candidate's high school education and related work experience, were not suspect (Pet. App. 147–153, 158–178). Accordingly, the district court held that petitioner's evidence dispelled the inference of discrimination created by the EEOC's statistical proof.

At the end of its opinion, the district court examined the facts regarding each of the 31 rejected black applicants who testified at trial and whom the EEOC alleged had been discriminated against by petitioner (Pet. App. 178–214). Remarkably, the court found that each and every applicant's timing or qualifications were such that the failure to hire them could be explained on nonracial grounds. The court finally concluded that the EEOC had failed to prove by a preponderance of the evidence that petitioner was guilty of a pattern or practice of racial discrimination in its hiring.

3. The court of appeals, by a vote of 2–1, affirmed in part[4] and reversed in part (Pet. App. 1–93). The court first held that the district court had jurisdiction over the claims relating to the Portsmouth branches. It concluded that the charge and conciliation efforts with regard to Suffolk sufficed to put petitioner on notice generally of the problem and to provide it with an opportunity to settle the dispute, which is all that Title VII requires (Pet. App. 11–12).

On the merits, the court of appeals agreed with the district court's conclusion that the disparity in numbers between petitioner's black employees and those available in the work force was sufficient to prove a prima facie case (Pet. App. 18–20). The court concluded, however, that the district court erred in finding that the prima facie case was rebutted. With regard to the binomial distribution analysis, the court held that the district court erred in inferring no discrimination from standard deviations generally between two and three (*id.* at 24). With regard to petitioner's hirings, the court of appeals held that the district court erred in using total work force data rather than data limited to

[4] The court affirmed only with regard to the managerial employees in the Suffolk branches, because there had been too few hiring decisions at that level to allow any inference of discrimination (Pet. App. 14–15, 27).

hirings of clerical and managerial employees. The court of appeals found that hirings compared to applicants in those higher employment categories showed significant underrepresentation of blacks.[5] The court also found that the number of hirings for clerical and managerial workers in Portsmouth and clerical workers in Suffolk was sufficient to permit an inference of discrimination to remain unrebutted (Pet. App. 53).

Finally, the court of appeals held that the district court's finding regarding the 31 rejected black applicants was of no significance because the testimony was offered solely for the purpose of buttressing evidence of a general pattern of racial discrimination in hiring, which had already been proved by the statistical evidence and remained unrebutted by any of petitioner's evidence (Pet. App. 39).[6]

Judge Russell dissented (Pet. App. 51–93). Initially, he disagreed with the majority's conclusion that the Portsmouth branches could be included in the suit without having been expressly included as part of the charge or conciliation (Pet. App. 51–61). On the merits, Judge Russell disagreed with both the majority and the district court on whether the government's statistical proof was sufficient to establish a prima facie case; he would have required the EEOC to subject its data to a binomial distribution analysis before it could satisfy its burden (*id.* at 74–77). The dissent

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[5] Petitioner regularly hired blacks for janitorial jobs, which is why the statistical showing for hirings based on all of petitioner's workers was equivocal (Pet. App. 45, 46).

[6] The court of appeals concluded that in view of the purpose of the individual testimony and "[a]ssuming * * * that its cumulative impact * * * was rightly assessed by the district court as not buttressing the EEOC's other evidence, * * * its cumulative impact [could not] be properly adjudged to rebut the EEOC's case" (Pet. App. 39).

The court of appeals reached a similar conclusion regarding petitioner's hiring practices. Noting the "unmistakable tendency" of petitioner's reliance on subjective evaluation by an all-white staff and word-of-mouth recruitment "to perpetuate the existing racial imbalance" (Pet. App. 37–38), the court of appeals held that "[t]he district court's apparent conclusion that [this evidence] had no such probative force or that its lack of force tended indeed to rebut the prima facie statistical showing reveals a misapprehension or misapplication of controlling principles of law" (*id.* at 39).

also concluded that unless the standard deviation derived from the binomial distribution analysis exceeded three it was insufficient to support an inference of discrimination (*id.* at 77–79).

With regard to the applicant flow data, Judge Russell found the evidence to be sufficiently reliable and complete to justify its use, and, at a minimum, would have deferred to the district court on this issue. Although the adjusted data, excluding janitorial hirings, did show statistically significant disparities in hirings at the .05 probability level (see note 9, *infra*), Judge Russell concluded that these data undercut the EEOC's case because the disparities did not exceed three standard deviations (*id.* at 87). Finally, the dissent found the district court's nonstatistical findings to be more than a neutral factor. Accordingly, he would have affirmed the judgment of the district court.[7]

ARGUMENT

1. Petitioner argues (Pet. 5–9) that the statistical analysis of the court of appeals conflicts with decisions of both other circuits and this Court. In this regard petitioner's assertion is twofold—(1) that the district court and court of appeals erred in not requiring the government as part of its case-in-chief to demonstrate that the gross disparities in petitioner's actual versus potential employees were statistically significant under a binomial distribution analysis and (2) that the court of appeals erred in holding that standard deviations not greater than two or three could support an inference of discrimination.

a. Petitioner's first issue is, however, inextricably tied to the second issue because if the disparities are in fact statistically significant then it essentially makes no difference whether the binomial distribution analysis is performed by the EEOC, the defendant or, as in this case, the court. In addition, the EEOC's proof was plainly adequate to make a prima facie showing under this Court's prior decisions. No

[7] The court of appeals denied petitioner's suggestion of rehearing en banc, with five judges dissenting. Judge Widener filed a dissent, joined only by Judge Russell, in which he basically restated the arguments in Judge Russell's previous dissent.

one can seriously examine the data in note 1, *supra* and not be impressed with the obvious and substantial underrepresentation of blacks on petitioner's workforce. That impression combined with the undisputed propriety of the district court's workforce comparison and the number of available jobs involved clearly prove a prima facie case. Nothing in this Court's decisions requires petitioner's wooden approach to statistical analysis in the face of data such as those involved in this case. See *Teamsters* v. *United States*, 431 U.S. 324, 339 (1977); *Hazelwood School District* v. *United States*, 433 U.S. 299, 311 & n.17 (1977) ("These observations [relating to *Castaneda* v. *Partida*, 430 U.S. 482 (1977)] are not intended to suggest that precise calculations of statistical significance are necessary in employing statistical proof"); *id.* at 316 (Stevens, J., dissenting); *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 213 (1979) (Blackmun, J., concurring). See also *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 584–586 (1979).[8]

In addition, contrary to petitioner's assertion (Pet. 5), no court of appeals has held that the government's use of gross disparities is per se inadequate to make a prima facie showing. In *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 544–545 (5th Cir. 1982), the evidence regarding disparities showed on its face de minimis difference between the percentages of minorities employed by the defendant and those in the work force. The binomial distribution analysis therefore merely confirmed what any reasonable person would have concluded from the aggregate data.

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[8] This is not a case like *Mayor of Philadelphia* v *Educational Equality League*, 415 U.S. 605, 620 (1974), relied upon by petitioner, where the proof involved only 13 positions, nine of which were filled by public officials and therefore where the asserted disparity's lack of probativeness was self evident. Instead, the statistical proof in this case indicates that it is much more likely than not that discrimination has been practiced by petitioner and therefore, if unrebutted, would fully support a finding of a Title VII violation.

Indeed, directly contrary to petitioner's submission in this case, the court in *Rivera* expressly noted that "[w]e do not mean to imply that in such clear cases a *ritual* of calculating the standard deviation must rigidly be observed." 665 F.2d at 545 n.21; emphasis added. See also *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 820–821 & n.32 (5th Cir. 1982). Thus, nothing in *Rivera* conflicts with the decision below.

In *Eubanks* v. *Pickens-Bond Construction Co.*, 635 F.2d 1341 (8th Cir. 1980), the court rejected reliance on disparities relating to only five jobs because the sample size was much too small to allow any kind of reliance on statistical proof. Thus, the decision is no more than a straightforward application of this Court's *Mayor of Philadelphia* v. *Educational Equality League*, *supra* decision. See note 8, *supra*. Moreover, the court of appeals expressly recognized that this Court's decision in *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), indicated that "gross statistical disparities alone may in a proper case constitute prima facie proof of discrimination." 635 F.2d at 1347. The court below did no more than recognize that this is a "proper case." Since that determination is fully consistent with the decisions of this Court and other courts of appeals, it does not warrant review.

b. Petitioner argues (Pet. 8) that this Court's decisions in *Castaneda* v. *Partida*, 430 U.S. 482 (1977), and *Hazelwood School District* v. *United States*, *supra*, mandate that a standard deviation greater than two or three is required before an inference of discrimination from employment statistics is permissible. Neither decision, however, can fairly be read as adopting so rigid a requirement. In both *Castaneda* and *Hazelwood*, this Court merely noted that "[a]s a *general rule* for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that [selections were] random would be suspect to a social scientist." 430 U.S. at 497 n.17; emphasis added; 433 U.S. at 309 n.14. This statement cannot, however, be converted into the unbending requirement proposed by petitioner, mandating in all cases that statistical disparities

must exceed two to three standard deviations before an inference of discrimination may be established. To do so, would, as this Court has said, ignore the irrefutable fact that statistics "come in infinite variety * * * [and] their usefulness depends on all of the surrounding facts and circumstances." *Teamsters* v. *United States*, *supra*, 431 U.S. at 340.

In this case, the court of appeals explained why standard deviations not as great as those discussed in *Castaneda* and *Hazelwood* may nevertheless be sufficient to support a rebuttable inference of discrimination (Pet. App. 24; footnote omitted):[9]

> [C]ourts of law should be extremely cautious in drawing any conclusions from standard deviations in the range of one to three. Above this range, with standard deviations of more than three, the analysis may perhaps safely be used absolutely to exclude chance as a hypothesis, hence absolutely to confirm the legitimacy of an inference of discrimination based upon judicial appraisals that disparities are, to the legally trained eye, "gross." This we conclude is all that the Supreme Court has ever directly approved by its own use of the process. Within the range of one to three standard deviations, where the probability of chance as explanation for revealed underrepresentation declines precipitately from only 5% at two standard deviations to less than 1% at three, we do not see how a court can properly find the only other hypothesis—discrimination—dispelled by this analysis alone.

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[9] This Court already has demonstrated its understanding of the binomial distribution analysis in both *Castaneda* v. *Partida*, *supra*, 430 U.S. at 496 n.17 and *Hazelwood School District* v. *United States*, *supra*, 433 U.S. at 311 n.17. In a discrimination case, it is designed to analyze whether the observed numbers of a minority group in one sample can best be explained by chance or by design. This is accomplished by comparing the data from the sample at issue with a control population using the statistical formula set out in the district court's opinion (Pet. App. 148). The number obtained is referred to as the "standard deviation." If it is approximately two, then the likelihood that the observed representation of the minority group is the product of chance is only one in twenty. At a standard deviation of three, the probability of a chance explanation reduces to one in 100 (Pet. App. 23–24).

The validity of the court of appeals' reasoning is amply supported by the uniformity of judicial opinion that standard deviations of less than three may properly support an inference of discrimination. See *Hilton* v. *Wyman-Gordon Co.*, 624 F.2d 379, 381 (1st Cir. 1980) (district court properly used .05 level of statistical significance, which is less than two standard deviations); *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1187 n.40 (5th Cir. 1976); *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 821 n.32 (5th Cir. 1982) ("[s]tatisticians tend to discard chance as an explanation for a result when deviations from the expected value approach two standard deviations"); *Hameed* v. *International Association of Bridge, Structural & Ornamental Iron Workers*, 673 F.2d 506, 514 (8th Cir. 1980) ("A difference of two or three standard deviations is statistically significant at the [accepted] five per cent significance level"); *Contreras* v. *City of Los Angeles*, 656 F.2d 1267, 1273 n.3 (9th Cir. 1981) (" '.05 level of statistical significance * * * is generally recognized as the point at which statisticians draw conclusions from statistical data' "); *White* v. *City of San Diego*, 605 F.2d 455, 460 (9th Cir. 1979); *Vuyanich* v. *Republic National Bank of Dallas*, 505 F. Supp. 224, 271–273 (N.D. Tex. 1980); *Rich* v. *Martin Marietta Corp.*, 467 F. Supp. 587, 601–603 (D. Colo. 1979). Indeed, even *Rivera* v. *City of Wichita Falls, supra*, 665 F.2d at 545 n.22, relied upon by petitioner, expressly adopted two standard deviations as a sufficient basis to show that the disparity "was not merely a fluke."

Accordingly, the holding of the court of appeals that a binomial distribution analysis, which revealed standard deviations that "lay preponderately within or above" (Pet. App. 24) the range of two to three, had not rebutted the prima facie case found by the district court[10] is fully consistent

[10] Quoting the district court out of context, petitioner suggests that in every instance, all the statistical disparities found by the district court, tested by the binomial distribution analysis, yielded standard deviations which "'remained less than two'" (Pet. 7). This is plainly incorrect as the charts and findings in the district court's opinion demonstrate (Pet. App. 150, 151, 152). The quotation from the district court applies only to clerical workers in the Suffolk branches for years other

with the decisions of this Court and every other court of appeals that has decided this issue. Accordingly, the decision does not warrant review by this Court.[11]

2. Petitioner claims (Pet. 10–14) that the court of appeals rejected findings of fact by the district court without employing the "clearly erroneous" standard in Fed. R. Civ. P. 52, and that the court of appeals erred in not remanding this case for further proceedings once it found that the district court had committed errors of law. The court of appeals, however, did not reverse for failure to apply a correct legal standard generally to the case, which typically requires a remand, but rather for mistaken reliance on legally insufficient evidence as rebutting the EEOC's prima facie case. Specifically, the court of appeals found that the district court misapplied the law with regard to the significance of the binomial distribution analysis, the applicant flow analysis and the individual testimony. Rule 52 does not apply to findings based on the misinterpretation of the "legal significance" of evidence. See *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 535–537 (1979). Accordingly, the court of appeals correctly rejected the judgment of the district court based on these errors.

First, petitioner contends (Pet. 11) that the court of appeals should have affirmed the district court's reliance on applicant flow statistics. But the court of appeals held that these data were incomplete[12] and that the district court had

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than 1969 and 1974, when the standard deviations were within the two to three range (Pet. App. 152). As the court of appeals recognized, and as undisputed charts in the district court's opinion show, most of the disparities in this case (Pet. App. 21) if aggregated by years and in work categories "lay preponderately within or above" the two to three standard deviation range. As the court of appeals found, the district court's finding on this point was "clearly erroneous" (Pet. App. 24–25).

[11] Petitioner contends (Pet. 9–10) that the equally divided vote of the court of appeals on the suggestion for rehearing en banc indicates an irreconcilable split that justifies review by this Court of the statistical proof issue. In this regard, we note only that no more than two judges on that court have expressed any views on the merits contrary to that of the panel majority and, in any event, for the reasons stated above, the panel's decision on the statistical issues is fully consistent with the decisions of all other courts.

[12] The district court itself noted that no explanation had been offered by petitioner for the wide fluctuation in the number of applica-

improperly lumped clerical workers with janitorial workers in a way that significantly distorted the data.[13] This Court has held that incomplete and undifferentiated statistics do not constitute reliable evidence in Title VII cases. See *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 584–587 (1979). Thus, the court of appeals properly held that the district court's finding here was contrary to law.

Second, petitioner contends (Pet. 12) that the court of appeals should have affirmed the district court's unexplained conclusion that "the number of hiring decisions which can be compared to application rates in [the applicant-flow] analysis (39 in Suffolk from 1969 to 1975 * * * and 24 in Portsmouth for 1975) are too few to justify an inference * * * of discrimination" (Pet. App. 147). As the court of appeals pointed out, however, with respect to Portsmouth, the limited evidence brought to the district court's attention was attributable to petitioner's failure to retain pre-1975 applications. Hence petitioner's self-created "small sample" at Portsmouth is no defense to an alleged Title VII violation. See *Bernard* v. *Gulf Oil Co.*, 604 F.2d 449 (5th Cir. 1979), aff'd, 452 U.S. 89 (1981). As for Suffolk, which had a total workforce of approximately 20 persons in each of the years between 1969 and 1975, the court of appeals held that 39 hiring decisions was a sufficient sample on which to draw an inference of discrimination because the "danger of unfairness to the employer in resting inferences of discriminat[ion]" on small samples must be balanced by

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tions submitted at Suffolk, which, as the court of appeals said, indicates that even at Suffolk, the applicant data were incomplete (Pet. App. 31).

[13] Although the district court was aware of the exact number of blacks hired for clerical jobs at the Suffolk branches (Pet. App. 145 n.51) and the exact number of blacks hired for both clerical and managerial jobs at the Portsmouth branches (*id.* at 146 n.52), it compared the black applicant rate with the percentage of blacks hired for *all* jobs in holding that applicant statistics had rebutted the prima facie case. On appeal, the court of appeals said that if janitorial and managerial appointments were removed from the hiring statistics at Suffolk and janitorial appointments were removed from Portsmouth, a comparison between applicant statistics and hiring statistics tended to confirm, not dispel, the inference that blacks had been excluded from white-collar jobs (Pet. App. 31–33).

the recognition that a "too ready rejection of claims solely on this account practically precludes proof of discrimination in circumstances involving local employers with relatively small total work forces" (Pet. App. 26–27). Thus, the district court's error is not factual and the court of appeals' conclusion that the presence of longstanding statistical disparities supports a prima facie case even if the number of hiring decisions is limited is correct. *Valentino* v. *United States Postal Service*, 674 F.2d 56 (D.D.C. 1982); *Coble* v. *Hot Springs School District*, 29 Fair Empl. Prac. Cas. (BNA) 201 (8th Cir. July 6, 1982).

Finally, petitioner argues (Pet. 12–13) that the district court's rejection of the claims of all individual applicants who testified should be dispositive of this case. Petitioner's argument is based on a misunderstanding of the purpose of the individual testimony in a case, such as this, alleging that an employer has engaged in a pattern and practice of race discrimination in hiring.

This Court made clear in *Teamsters* v. *United States*, *supra*, 431 U.S. at 336–339, that a pattern and practice case may be tried in two stages. At the initial "liability" stage, the government may establish a prima facie case revealing that "discrimination has been a regular policy" by relying on statistics alone. In such a case, individual testimony by rejected black applicants is offered for the limited purpose of bringing the "cold numbers convincingly to life." After a prima facie case is established and remains unrebutted, a second, post-trial relief stage is conducted to determine whether specific individuals are entitled to any recovery. 431 U.S. at 357–360. In this case, the district court specifically acknowledged that the Commission had intended to utilize the order and method of proof approved by this Court in *Teamsters*,[14] but—stemming from its

[14] Referring to stipulations set forth in the pretrial order, the district court said that in this case, the "EEOC seeks to use [testimony revealing] specific instances [of discrimination] to bolster its [statistical] case" (Pet. App. 116 n.17). In view of the district court's understanding of the stipulation, petitioner is simply incorrect in arguing that the court of appeals unfairly disregarded the stipulation in stating that testimony "'was not offered at [the liability] stage to establish

erroneous view that the statistical prima facie case had been rebutted—the district court treated individual testimony by rejected black applicants as a series of individual Title VII actions. Consequently, the court of appeals—consistent with the rulings of other circuits[15]—held that the district court's "out of hand rejection" of the individual testimony was at most a "neutral" factor, which neither confirmed nor rebutted the prima facie case.

In sum, none of the errors reversed by the court of appeals involved factual disputes.[16] Accordingly, the court of

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entitlement to individual relief, but merely as corroborating or buttressing evidence of a general pattern of racial discrimination in hiring'" (Pet. App. 92).

[15] At least three courts of appeals have held that during the liability stage of a pattern and practice case in which parties seek to introduce evidence which confirms or rebuts the allegation that an employer engaged in a regular or recurring practice of discrimination against a class, a court should not judge the individual claims of specific members of the class. *Dickerson* v. *United States Steel Corp.*, 582 F.2d 827, 830–831, 833 (3d Cir. 1978). See also *Ste. Marie* v. *Eastern Railroad Association*, 650 F.2d 395, 407 (2d Cir. 1981); *Harrell* v. *Northern Electric Co.*, 679 F.2d 31, 32 (5th Cir. 1982).

[16] Petitioner suggests (Pet. 13–14) that this is an appropriate case for the Court to vacate and remand in light of this Court's recent decision in *Pullman-Standard* v. *Swint*, No. 80–1190 (Apr. 27, 1982). In *Pullman-Standard* the issue was whether a court of appeals could disregard Rule 52 in reviewing admittedly factual findings in a Title VII suit. That issue has nothing to do with this case where the court of appeals consistently rejected the district court's findings on legal grounds.

Nor did the court of appeals err in declining to remand for additional findings. *Pullman-Standard* announced no new rule on this issue. Indeed, the Court there reaffirmed that when a district court commits a legal error, remand is not necessary if the "record permits only one resolution of * * * factual issue[s]." Slip op. 18, citing *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 331–332 (1974). See also *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534–537 (1979). The court of appeals' analysis properly reduced the case to the statistical proof, which it held could lead to but one conclusion. All of the other evidence if evaluated by correct legal standards supported the EEOC's case or was, at best, neutral. It was therefore unnecessary to remand this case a third time to the district court for another trial.

appeals properly reversed and remanded only for determination of appropriate relief.[17]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Equal Employment Opportunity Commission

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[17] Petitioner also challenges (Pet. 14 n.5) the court of appeals' holding that the Commission's action properly included discrimination at the Portsmouth branches as well as the Suffolk branches. In rejecting petitioner's view, the court of appeals held that the purpose for requiring the EEOC to make the reasonable cause determination before filing suit—notice and an opportunity for conciliation—had been fulfilled. The court of appeals found that petitioner, which controls and supervises the hiring policies of branches in both Portsmouth and Suffolk, had received notice that its general hiring practices were challenged as discriminating on the basis of race (Pet. App. 12). The court also found that "[h]ad * * * conciliation effort[s] been successful, given the common control over and similar practices at the two cities' branches, whatever changes were to be instituted at the Suffolk branches would no doubt logically and necessarily have been made at the Portsmouth branches as well" (Pet. App. 11). Based on a pragmatic analysis of the procedural requirements, identical to that employed by other courts of appeals, *EEOC* v. *McCall Printing Corp.*, 633 F.2d 1232, 1235 (6th Cir. 1980); *EEOC* v. *Huttig Sash & Door Co.*, 511 F.2d 453, 455 (5th Cir. 1975), the court below held that inclusion of the Portsmouth branches was neither unfair nor improper. Since the decision is a reasonable application of the notice and conciliation provision to these unique facts and conflicts with no decision of any other court of appeals, there is no reason for this Court to review this issue.